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Petition not printed

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1944

No. 432

MRS. EULA MAY WALTON, ADMINISTRATRIX OF THE ESTATE OF FRED WALTON, DECEASED,
Petitioner,

vs.

SOUTHERN PACKAGE CORPORATION,
Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO APPLICATION FOR WRIT OF CERTIORARI

W. S. HENLEY,
WM. H. WATKINS,
P. H. EAGER, JR.
Attorneys for Respondent.

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RESPONDENT'S BRIEF IN OPPOSITION TO APPLICATION FOR WRIT OF CERTIORARI

POINT I

The judgment of the Supreme Court of Mississippi sought to be reviewed is not a final judgment

The Supreme Court of the State of Mississippi in reversing the judgment which petitioner has obtained in the Circuit Court of Claiborne County, Mississippi did not enter a final judgment. The Court held that the petitioner, intestate, having received contractual wages equivalent to the standard compensation provided by the regulations, but having worked overtime in an industry where his services bore some relation to Interstate Commerce and having worked in excess of eight hours per day, he was entitled to the additional compensation provided by the act, but that the damages for failure of the employer to pay for the overtime

was penal in nature and was barred by the one-year statute of the State of Mississippi.

The opinion provided that the case should be affirmed if the petitioner should remit the $400.00 representing damages for failure to make overtime payment which was penal in nature, otherwise the case was reversed for a new trial in accordance with and not inconsistent with the opinion of the Court. It is admitted that the petitioner declined to enter the remittitur and, therefore, the case stands reversed to the Circuit Court of Claiborne County, Mississippi for re-trial, where not only the facts may be re-tried but the question of attorney's fees may be re-litigated.

A writ of certiorari may only be issued by this Court to the Supreme Court of a state court to review a final judgment thereof.

The order of reversal in this case contained the following language:

> "And it is further ordered that this cause be, and the same is hereby, remanded to the said Supreme Court for further proceedings not inconsistent with the opinion of this Court."

The foregoing is not a final judgment within the meaning of Paragraph B, Section 344, Title 28, U. S. C. A. The following authorities are directly in point: *Arnold* v. *United States, for the Use of W. B. Guimarin & Co.*, 263 U. S. 427, 44 S. Ct. 144, 68 L. Ed. 371; *Louisiana Navigation Co.* v. *Louisiana Oyster Commission*, 226 U. S. 99, 33 S. Ct. 78, 57 L. Ed. 138; *Norfold & So. Turnpike Co.* v. *Virginia*, 225 U. S. 264, 32 S. Ct. 828, 56 L. Ed. 1082; *Loever* v. *Schroeder*, 149 U. S. 580, 13 S. Ct. 934, 936, 37 L. Ed. 856; *Clark* v. *City of Kansas City*, 172 U. S. 334, 19 S. Ct. 207, 43 L. Ed. 467; *Weston* v. *City Council of Charleston*, 27 U. S. 449, 7 L. Ed. 481; *Ga. R., etc. Co.* v. *Decatur*, 262 U. S. 432, 43 S. Ct. 613, 67 L. Ed. 1065.

POINT II

The Supreme Court of Mississippi decided that under the Mississippi Statute the damages for failure to pay overtime was a penalty and barred by the one-year statute of limitations. We submit that the conclusions of this Court are correct.

The Supreme Court of Mississippi in its opinion, *Southern Package Corporation* v. *Walton*, 18 So. (2d) 458, used the following language:

> "But as to the additional $400 allowed by the court below as alleged 'liquidated damages,' provided for under the Act without reference to the amount of damages sustained by the employee on account of working overtime, we are of the opinion that the same is, in its essential nature, a penalty imposed against the employer, not for working the employee overtime, but for failure to pay the overtime compensation when due. Ordinarily, the only damages recoverable for failure to pay a sum of money when due is the legal rate of interest thereon. It was said in the case of James Loudon v. Taxing District of Shelby County, 104 U. S. 771, 774, 26 L. Ed. 923, that: 'It is sufficient to say that all damages for delay in the payment of money owing upon contract are provided for in the allowance for interest, which is in the nature of damages for withholding money that is due. The law assumes that interest is the measure of all such damages.' Also, in the case of New Orleans Insurance Co. v. Rinaldo Piaggio, 16 Wall. 378, 386, 83 U. S. 378, 21 L. Ed. 358, where the suit was on an insurance policy, it was said that: 'Damages were claimed by the plaintiff in this case for alleged loss on account of the failure of the defendants to make payment as stipulated in the policies, and it appears by the verdict that the jury awarded to the plaintiff $5000 on that account, in addition to lawful interest. * * * Where a principal sum is to be paid at a specific time, the law implies an agreement to make

good the loss arising from a default by the payment of lawful interest.' See also Bixby-Theirson Lbr. Co. v. Evans, 167 Ala. 431, 52 So. 843, 844, 29 L. R. A. N. S., 194, 140 Am. St. Rep. 47, where it is said that: 'Money like the staples of commerce, is, in contemplation of law, always in the market and procurable at the lawful rate of interest. For the breach of a contract to pay, the principal with interest is the measure of damages such is the invariable measure in a creditor's action against his debtor. 1 Suth. Dam., section 76.'

"In Missouri Pacific R. Co. v. Ault, 256 U. S. 554, 41 S. Ct. 593, 597, 65 L. Ed. 1087, an Arkansas statute had provided that if a railroad company should fail to pay an employee his full wages within seven days after discharge, his wages should continue at the same rate until he was paid. The Supreme Court of the United States, speaking through Mr. Justice Brandeis, held that this statute imposed a penalty; that therefore when the federal government took over the operation of the railroads in 1918 and made itself, by statute, subject to all liabilities of common carriers arising under the state or federal laws or at common law, but not in actions or suits for the recovery of penalties, the employee-plaintiff was not entitled to recover the extra amount sued for. The Court used the following language: 'The amount recovered in the present case over and above the wages due and unpaid with interest is in the nature of a punishment * * *.' 'Whatever name be applied, the element of punishment clearly predominates, * * *.' The Supreme Court of Arkansas had held that it was not technically a penalty, declaring, 'It is allowed for a double purpose,—as a compensation for the delay, and as punishment for the failure to pay.' Leap v. St. Louis, I. M. & S. Ry. Co., 58 Ark. 407, 25 S. W. 75, 85, 23 L. R. A. 264, 41 Am. St. Rep. 109. This view of the Arkansas Court was not upheld. Moreover, it is generally held that a statute is penal in character where its controlling purpose is to impose a punishment for the violation of its provision, and that question is to be determined by the laws of the forum in deciding

whether a suit is barred by a statute of limitation against the recovery of penalties."

POINT III

The Supreme Court of Mississippi has decided that the additional four hundred dollars provided in the act is penal in nature and barred by the one-year statute.

Section 731, Mississippi 1942 Code, is in the following language:

> "Action for penalty commenced in one year.—All actions and suits for any penalty or forfeiture, on any penal statute, brought by any person to whom the penalty or forfeiture is given, in whole or in part, shall be commenced within one year next after the offense was committed, and not after."

The Supreme Court of Mississippi has decided that wherever damages are provided for a breach of contract which had no relation to the actual damages sustained that such provision is penal in nature. The employee contracted to work for standard wages in accordance with the Act of Congress. Additional compensation is provided for working overtime, for which additional compensation recovery is allowed in this case. Not only is it true that the liquidated damages bear no relation to the damages sustained, but the overtime payment is provided as compensation for the overtime; whereas, the liquidated damages necessarily are a punishment for not promptly paying the overtime compensation.

The decision of the Supreme Court of Mississippi that such damages are penal in nature within the section of the Mississippi Code above referred to are binding upon this Court. *Guaranty Trust Company* v. *Blodgett*, 287 U. S. 509, 77 L. Ed. 463; *Midland Realty Co.* v. *Kansas City Power & Light Company*, 300 U. S. 109, 81 L. Ed. 540;

Schuylkill Trust Co. v. *Pennsylvania*, 302 U. S. 506, 82 L. Ed. 392; *Bacon* v. *Martin*, 305 U. S. 380, 83 L. Ed. 233; *Turner* v. *Board of Trade of City of Chicago*, 245 U. S. 667, 62 L. Ed. 538; *Gregg Dyeing Co.* v. *Query*, 76 L. Ed. 1232, 286 U. S. 472; *Gatewood* v. *State of North Carolina*, 203 U. S. 531, 51 L. Ed. 305; *Green* v. *Frazier*, 64 L. Ed. 878, 253 U. S. 233.

POINT IV

In this case pending before the Supreme Court of Mississippi it was entitled to determine for itself, under its own laws and statutes, the nature of the liquidated damages, the nature of the cause of action sought to be enforced.

The term "liquidated damages" is a common law term. In order to obtain a correct definition, the common law must be looked to. This Court has no common law. *Erie Railroad Company* v. *Tompkins*, 304 U. S. 64, 82 L. Ed. 1188. The contract was made and performed in the State of Mississippi and the nature of the liquidated damages should be determined according to the laws of the State of Mississippi. *Wichita Royalty Company* v. *City National Bank of Wichita Falls*, 306 U. S. 403, 83 L. Ed. 515; *Russell* v. *Todd*, 309 U. S. 280, 84 L. Ed. 754 The Supreme Court of Mississippi, being the final interpreter of its own statutes, necessarily should be permitted to determine whether or not an action is penal within the meaning of such statutes. The cause of action being penal under the statutes of the State of Mississippi, it was entitled to determine the conditions upon which such cause of action would be enforced, if at all. The Supreme Court of Mississippi has decided that under its laws and statutes where the employee received standard wages and is thereafter allowed compensation for extra time, plus attorney's fees, that an additional sum having no relation to any damages which might be sustained is penal in nature. Congress has provided no statute of limitations providing for the time within which such

suits may be brought, and, that being true, the statute of limitations of the State of Mississippi governs. *Townsend* v. *Jemison*, 50 U. S. 407, 13 L. Ed. 194; *Flowers* v. *Foreman*, 64 U. S. 132, 16 L. Ed. 405; *Hanger* v. *Abbot*, 73 U. S. 532, 18 L. Ed. 939; *Continental Ill. Nat. Bk. & Trust Co.* v. *Holmes* (D. C.), Penna., 21 Fed. Supp. 309, and cases cited.

A state has the right to determine what causes of action shall be entertained in its courts, conditions thereof, which necessarily implies the right to provide the time within which said suits may be brought. *Mosby* v. *Manhattan Oil Co.*, 52 Fed. (2d) 364, cert. den., 284 U. S. 676, 76 L. Ed. 572; *U. S.* v. *Bank of New York*, 10 Fed. Supp. 269, affirmed 77 Fed. (2d) 866, and affirmed 296 U. S. 463, 80 L. Ed. 331; *U. S.* v. *Belmont*, 85 Fed. (2d) 542, reversed on other grounds, 301 U. S. 324, 81 L. Ed. 1134; *James-Dickinson Farm Mortg. Co.* v. *Harry*, 47 S. Ct. 308, 273 U. S. 119, 71 L. Ed. 569. See also, Corpus Juris Secundum Vol. 21, Subject "Courts," Page 107.

It has been frequently held that under the full faith and credit clause of the United States that a state might determine for itself whether or not it would enforce a cause of action, penal in nature, or contrary to the public policy of the United States. *Pacific Employers Insurance Company* v. *Industrial Accident Commission*, 306 U. S. 493, 83 L. Ed. 940; see also *Fauntleroy* v. *Lum*, 210 U. S. 230, 52 L. Ed. 1039.

We respectfully submit that the application for certiorari should be denied.

W. S. Henley,
Wm. H. Watkins,
P. H. Eager, Jr.
Attorneys for Respondent.

I, William H. Watkins, of counsel for the respondent in the above case, certify that I have this day forwarded

by United States Mail, postage prepaid, to Berger & Gholson, of Port Gibson, Mississippi, c/o Sgt. Frederick C. Berger, Section 1, FSAAF, Ft. Sumner, New Mexico, of counsel for petitioner, a true and correct copy of the foregoing brief.

This, the 6th day of October, 1944.

WILLIAM H. WATKINS,
Of Counsel.

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